

MEMO# 35457

September 29, 2023

ICI Recommends Withdrawal of Wyoming's Proposed Amendments Prescribing ESG-Related Advisory Disclosure

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TO: Broker/Dealer Advisory Committee
ESG Advisory Group
Investment Advisers Committee SUBJECTS: Disclosure
ESG
Investment Advisers

State Issues RE: ICI Recommends Withdrawal of Wyoming's Proposed Amendments Prescribing ESG-Related Advisory Disclosure

On September 28, 2023, ICI submitted a letter regarding proposed amendments to the Wyoming Secretary of State's Securities Rules that would "require disclosure of Environmental, Social, and Governance ('ESG') investment strategies by requiring investment advisers [and their representatives, [\[1\]](#) among others], to disclose to their customers or clients whether they are incorporating a social objective, i.e. whether they are considering social criteria, in the investment or commitment of customer or client funds." [\[2\]](#) ICI's comments solely focused on the impact the proposed amendments, if adopted, would have on investment advisers. [\[3\]](#)

ICI recommended that Wyoming withdraw the proposed amendments. The proposed amendments, if adopted, would be subject to legal challenges under the National Securities Markets Improvement Act of 1996 ("NSMIA"). NSMIA would pre-empt the proposed amendments to the extent that they cover federal covered investment advisers or their representatives. [\[4\]](#) Additionally, the First Amendment of the US Constitution prohibits Wyoming from requiring advisers to make misleading statements. Beyond this, ICI believes that the proposed amendments, as drafted, are unworkably vague, unnecessary, and would be costly to implement.

The submitted letter is enclosed and provides further detail on ICI's arguments made to the Wyoming Secretary of State regarding the proposed amendments.

Notes

[1] For simplicity, the terms "investment advisers" or "advisers" were used throughout the letter to include both investment advisers and investment adviser representatives.

[2] Proposed Amendments to Chapters 2, 4, 5, and 10 of the Wyoming Secretary of State's Securities Rules, available at https://rules.wyo.gov/DownloadFile.aspx?source_id=9311&source_type_id=109&doc_type_id=2122&file_type=pdf&filename=9311.pdf&token=156005199228190043109057027219206193177052022244.

[3] ICI represents its members in their capacity as investment advisers to retail SMAs. We note, however, that many of the points in the letter also broadly reflected how the proposed amendments would affect broker-dealers and their agents.

[4] Presumably, the scope of the term "investment adviser" in the proposed amendments reflects, and is consistent with, Wyoming's definition of "investment adviser," which rightly excludes from the definition of "investment adviser" advisers registered under the Investment Advisers Act of 1940 ("Advisers Act"). See W.S. § 17-4-102(a)(xv). However, the proposed addition of the language "Investment advisers and investment adviser representatives covered by this section [regulating how a federal covered adviser shall make notice filings] shall adhere to the [Required Disclosures for Investments that Incorporate a Social Objective section]" suggests otherwise. Further, as drafted, it appears that Wyoming does intend to apply the proposed amendments to the investment adviser representatives of federal covered advisers. To the extent Wyoming intends the proposed amendments to apply to federal covered advisers and their representatives, NSMIA pre-empts such application. ICI believed it was important to submit a letter so the record reflects that fact.